No. 16282

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REXALL DRUG COMPANY, a corporation, and ARNOLD L. LEWIS, doing business as Studio Cosmetics Company,

Appellants,

vs.

SANDRA MAE NIHILL, etc.,

Appellee.

Opening Brief of Appellant Arnold L. Lewis, Doing Business as Studio Cosmetics Company.

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This is an appeal from a judgment for $48,000.00 in favor of appellee upon the verdict of a jury, in an action for damages for personal injuries, brought by Sandra Mae Nihill, a minor, against appellant, Arnold L. Lewis, the manufacturer of a home permanent wave preparation, and appellant Rexall Drug Company, a corporation, the vendor of the product.

The appellee's mother claimed to have purchased a home permanent wave kit from a Rexall Drug Store in Kensal, North Dakota. The home permanent was thereafter administered to the plaintiff who started to lose hair approximately a week to ten days later. Ultimately, and after a period of approximately four to five months, she lost most of her hair. It is claimed that such loss is permanent.

The judgment was entered on April 29, 1958 [p. 90].

A motion for judgment notwithstanding the verdict or for a new trial was filed on April 21, 1958 [pp. 82-84] and the motions were thereafter denied on June 26, 1958 [p. 91].

A stipulation and order fixing bond on appeal was filed on July 29, 1958 [p. 94].

A statement of points on appeal on behalf of appellant Lewis was filed on December 18, 1958 [p. 811].

Jurisdiction was vested in the District Court by reason of a diversity of citizenship between the appellant and the appellee, the appellee at all times being a resident of the State of North Dakota [pp. 11; 198]. The appellant Arnold L. Lewis was at all times a resident of the State of California [p. 29] and the defendant Rexall Drug Company, a corporation, was a Delaware corporation authorized to do business in the State of California [p. 28].

The Constitution of the United States expressly provides for the jurisdiction in the District Courts of suits between citizens of different states where the sum sought is in excess of $3,000.00. Here the prayer of the complaint was in the sum of $250,000.00 [p. 14].

Williams v. Greenbay & W. R. Co., 66 S. Ct. 284, 326 U. S. 549, 90 L. Ed. 311.

An appeal from the final judgment of the United States District Court to the United States Court of Appeals is authorized by the provisions of the Judicial Code, 28 U. S. C. A. 1291.

Summary of Argument.

The evidence fails to establish *actionable* negligence on the part of appellant manufacturer, Arnold L. Lewis. Actionable negligence embraces the concept of duty, breach of that duty and injury *proximately* resulting from a breach of the duty. Although appellee contends that the appellant, Arnold L. Lewis, the manufacturer of the home permanent wave in question, was guilty of negligence in manufacturing the product, they produced not a scintilla of evidence to support the proposition that there was any defect in the preparation or compounding, manufacture, sale or distribution of this product. No negligent *act* of any character can be tortured out of the evidence. Plaintiff's case is shrouded in speculation and conjecture.

The absence of any direct or indirect evidence of negligence in the manufacture of the product precipitated plaintiff's request for an instruction on the doctrine, *res ipsa loquitur*. Appellant contends that this doctrine, under the well settled principles applicable thereto *cannot* be applied in this case and that in any event the form of the instruction was prejudicially erroneous.

The trial court over objection also instructed the jury on the doctrine which related to the duty of a manufacturer of a product that is *inherently dangerous,* or reasonably certain to be dangerous if negligently made. The record is devoid of any evidence which would justify the giving of this instruction.

Merrill v. Beaute Vues Corp., 235 F. 2d 893 (C. C. A. 10).

Particularly prejudicial was the action of the trial court in permitting, over objection, the testimony of two

witnesses, who claimed to have used a home permanent manufactured by appellant, under circumstances which are not shown to have been even remotely similar, *and where the alleged results were not* shown *to have been the same or similar.*

Appellant contends that a verdict of $48,000.00, based upon the paucity of the medical evidence produced, even assuming liability, was excessive as a matter of law.

It is appellants contention that the verdict of the jury is utterly without support in the evidence and that the trial court committed error in the various respects hereinabove specified and in particular erred in refusing to direct a verdict for appellant, or in lieu thereof, refusing to grant appellant's motion for a judgment notwithstanding the verdict.

Specification of Errors.

The Specification of Errors are contained in the Statements of Points relied upon and are as follows:

1. The evidence was insufficient as a matter of law to establish any actionable negligence against the appellant manufacturer and the implied finding of the jury in that regard cannot be supported.

2. The trial court committed prejudicial error in instructing the jury over appellant's objection on the doctrine of *res ipsa loquitur;* and in any event the form of the instruction on this doctrine was prejudicially erroneous.

In conformity with Rule 18, the instruction on *res ipsa loquitur* is herewith set forth in full:

> "It is your duty to consider and make up your verdict from all the evidence in the case, taking

into consideration the rule of evidence that I will now give you. That rule of evidence is known as *res ipsa loquitur,* that is to say, the thing speaks for itself, and that rule of law is recognized by the Courts as the law in cases similar to this.

"That if you should believe, from the evidence in this case, that Sandra Nihill suffered an injury as a proximate result of the application of the Cara Nome Pin Curl Wave, and, if you should believe from the evidence, that in the application of this product she used all of the instructions put out by the defendant manufacturer, Studio Cosmetics Company, and properly and clearly followed same, as put out, and that no tampering had been done with it, and that nothing else caused her injuries, or her condition, then, under the law, you are authorized to draw the inference of negligence, and by that is meant this:

"That the rule of evidence applies where the plaintiff cannot have or be expected to have any information as to the manufacture or the ingredients or the effect of the home wave product used, or have any information as to what might result from the use thereof, whereas the manufacturer, Studio Cosmetics Company, must be assumed to have full information of all of these subjects and know just what material and what workmanship were used, and what the effects upon a human being might be from the use of these materials and failed to make known these things to the plaintiff and to the public. That is so particularly where the event following the use of the product is shown to be that ordinarily not expected to occur when the manufacturer uses due

care in the manufacture of such a product, and it is not necessary for the plaintiff to go further and prove particular acts of omission or commission on the part of the manufacturer from which the event resulted, but the event itself makes proof of inference of negligence on the part of the manufacturer from which the jury may infer that the manufacturer was negligent, if the plaintiff has shown by a preponderance of the evidence that the product was manufactured by the defendant and that all instructions put out by the defendant for its application were followed substantially by the one using it, and that the one using such product was injured as a result of using it, then that inference of negligence arises, but it is not conclusive; it is an inference of negligence that the plaintiff is entitled to have received without further proof."

Prior to the giving of any instructions, a conference was had between counsel and at that time the court indicated that it would give the instruction on *res ipsa loquitur*.

Appellant's counsel objected to the giving of any instruction at said time [p. 721]. Thereafter the following specific objection was made to the quoted instruction after the same had been given, in accordance with the Federal rules:

"Mr. Packard: Let the record show the defendant Studio Cosmetics, Arnold L. Lewis, doing business as Studio Cosmetics, objects to the giving of Plaintiff's Amended Instruction Request No. 6, which is an instruction based upon the doctrine of *res ipsa loquitur*. I have thoroughly gone into the matter, I believe, in my motion for non-suit and directed ver-

dict. I feel that the instruction is not applicable in a situation where there is testimony of several plausible causes, one of which the defendant would not be responsible or liable. Secondly, I object to the giving of the instruction. The instruction itself is ambiguous, uncertain, it doesn't properly instruct the jury on the doctrine of *res ipsa loquitur,* and it does not submit to the jury the doctrine of *res ipsa loquitur* as a question of fact, but submits the matter to the jury upon a finding by the court as a matter of law that the doctrine is applicable. I object to the giving of the instruction and I state that it is error to give the instruction and further that it was improperly submitted—

The Court: It was the intention of the court to submit certain of the questions upon which the doctrine was based to the findings of the jury.

Mr. Packard: Well, I feel that it does not submit the question of control or the elements of the doctrine of *res ipsa loquitur* as a question of fact, or whether it was a type of result which would normally follow in the course of human events, it's not for the negligence of the defendant, and the other requisites for the doctrine have not been given in the instruction; that it's uncertain in that they refer to 'if you find from the evidence that Sandra Nihill suffered an injury as a proximate result,' there's an inference of negligence, and it's uncertain as to what you refer to by an 'injury' in the case. Further, the instruction contains the language 'that is so, particularly where the event following the use of the product is shown to be that ordinarily not expected,' and it's uncertain as to what is referred to as 'event following,' and I believe it fails to in-

struct what proximate cause is. I want the record to show that we object to the instruction—plaintiff amended instruction No. 6—on those grounds, not limiting our objection to those grounds, but claim the doctrine is not applicable."

3. The trial court committed prejudicial error in instructing the jury on the liability of a manufacturer of a product which is inherently dangerous.

The Court instructed the jury as follows:

"You are instructed that the manufacturer of a product that is either inherently dangerous, or reasonably certain to be dangerous if negligently made, owes a duty to the public generally and to each member thereof who will become a purchaser or user of the product. That duty is to exercise ordinary care to the end that the product may be safely used for the purpose for which it was intended and for any purpose for which its use is expressly invited by the manufacturer. Failure to fulfill that duty is negligence."

Specific objection was made to the giving of this instruction at the appropriate time, as follows:

"Mr. Packard: Then I wish to except to plaintiff's jury instruction No. 7, which states that the manufacturer of a product that is inherently dangerous, or reasonably certain to be dangerous if negligently made, owes a duty to warn, and so forth, upon the basis that there's no evidence in this record to show that the product in question was inherently dangerous. The only evidence shows that it is an alkali, that the contents are not as strong as those contained in a lot of normal home soaps and there's

no evidence whatever to show that the solution made in any particular concentration would be toxic or have ill effects. I object and except to that."

4. The trial court committed prejudicial error when it permitted the reading over appellant's objection of the depositions of Mrs. Donald Carlson and Mrs. Carl Carlson, where there was no foundation laid to show a sufficient similarity of conditions.

In compliance with Rule 18, appellant sets forth the substance of the evidence admitted over his objection.

Mrs. Donald Carlson testified that she bought a Cara Nome home permanent set at the Kensal Rexall Drug Store some time in March of 1955 [p. 527]. She did not describe the type of home permanent kit that she bought. She claimed that after the permanent wave, her hair was strawy and dry and the ends were funny colored, more or less, they were lighter on the ends than they were at the scalp. The ends were split and she finally had her hair cut [p. 528]. She noticed nothing unusual about the smell other than it was similar to most permanent solutions [p. 529]. She did not notice any difference in the effect of the solution on her hands as compared with other home permanent wave solutions that she had used. She suggested that it rusted the bobby pins. At the time her deposition was taken she had a full head of hair [p. 531].

Mrs. Carl Carlson testified that she also purchased a Cara Nome permanent kit. She noticed that after the wave her bobby pins were rusting and she seemed to have two colors of hair. Some of the hair broke off [p. 535]. She had her hair cut and had no further problem [p. 537].

To this evidence, objections were repeatedly made [p. 448]. Finally the court decided that it would be reversible

error to permit the reading of the depositions [p. 458] and refused to permit their reading. Subsequently a motion to reopen the case was made for the purpose of again offering the depositions [pp. 475, 476]. Objections were made upon the ground that there was no proper foundation laid, to show that the product used by the Carlsons was out of the same batch [p. 451]; there was no foundation laid to show that the conditions under which the waves were given was substantially the same [p. 452]. There was no foundation laid to show that the Carlsons used the pin curl permanent as distinguished from some other type of permanent; that the results were entirely different; that neither of the women had any loss of hair such as claimed by the plaintiff. There was some breakage, it was trimmed off and it grew out and they are perfectly all right [pp. 452, 453]. Further objections upon these same grounds were made at pages 476, 477 and 478.

5. The damages awarded by the jury's verdict were clearly excessive.

6. The trial court erred in denying the appellants' motions for judgment under Rule 50(b), Federal Rules of Civil Procedure [p. 82].

Statement of the Case.

A. The Product, Cara Nome Natural Curl Pin Curl Permanent.

Appellant, Arnold L. Lewis, was the manufacturer of a product known and sold as Cara Nome Natural Curl Pin Curl Permanent [p. 29].[1] Lewis sold the product to

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[1]This was one of five types of home permanent kits manufactured by Appellant Lewis. The other kits contained the same chemicals but in different proportions [p. 651]. Each kit was designed for a special purpose [p. 652].

appellant Rexall Drug Company. He had been a cosmetics manufacturer since 1936 [p. 649] and had been in the beauty supply business since 1929 [p. 649]. He had been president of the California Cosmetic Association on two separate occasions [p. 650] and was obviously qualified in his field.

The cold waves first made their appearance on the American market in 1941 [p. 650]. Lewis was thoroughly familiar with the cold wave solutions put on the market, not only by himself but by others [p. 650]. Apparently the large manufacturers operate pursuant to a licensing agreement under the "McDonald" patent which permits them to use a preparation known as Ammonium Thioglycolate [pp. 651, 673]; which is the basic ingredient of all cold wave preparations [p. 650].

Actually Lewis was unable to satisfy the demand and made arrangements with the Toni Company for additional manufactured units pursuant to the same formulation [p. 658]. Lewis also manufactured cold waves for other companies under various brand names [p. 659]. He furnished the kits for Rexall ever since 1946, although, at one time a different brand name was used [p. 658].

On an average Lewis marketed about 450 thousand kits a year [p. 660]. Of this number approximately 45,000 were of the "pin curl" variety [p. 676].

Each batch is carefully prepared under the supervision of a chemist and the "thio" content is determined by chemical titration and the PH by an electrical device known as Beckmans meter. These results are recorded and form a part of the records of the company [p. 654].

Batch No. 181, a pin curl batch, is claimed to have been the batch from which the pin curl kit used by appellee

was manufactured [see Deft. Ex. G, p. 657]. This batch produced 10,400 bottles of the pin curl preparation which was shipped, 50 per cent to a Rexall distribution center in Chicago and 50 per cent to a Rexall distribution center in Georgia [p. 660]. The company chemists analysis revealed, for this batch, the following contents: Ammonium thioglycolate, ammonium hydroxide, opacifier, distilled water, triton 200 and perfume. The "Thio" content was 7.07 per cent, free ammonia 85 per cent, and the PH 9.3 per cent. There is not one scintilla of evidence that these chemicals, in these proportions or *any other,* are harmful to hair or scalp of normal human beings.[2]

The evidence is uncontradicted that all cold wave solutions contain "as small an amount as three per cent of calculated thioglycolate acid, *and as high as 10 per cent* [p. 590]; that the normal is, "of the order of seven per cent" [p. 591]. Dr. C. E. P. Jeffreys, an eminently qualified consulting chemist [pp. 588-589] analyzed a sample from batch No. 181 and found 6.94 per cent of thioglycolate acid. In addition the PH factor was 9.2 per cent [p. 592]. This is a measurement of the alkalinity factor—so that actually the cold wave, even though thioglycolate *acid* is used, is actually alkaline [p. 592]. Other cosmetics on the market have higher PH factors than the cold wave; soap for example, with a PH factor of 10 per cent [p. 593]. Thioglycolate is toxic if *consumed by mouth,* but not *"by putting it on your skin"* [p. 607].

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[2]Plaintiff produced *no chemist.* Not one of plaintiff's doctors (Martin, Melton or Levitt) ever suggested that the percentage of thioglycolate contained in batch No. 181 was excessive for use on the hair or scalp of normal human beings. It is particularly interesting to note that after plaintiff had retained an attorney, she purchased at the same drug store, a similar kit, with the lotion produced from batch No. 191, [Pltf. Ex. No. 34], but no effort was made by plaintiff to have this analyzed.

A pin curl permanent is intended to be casual type of permanent and has a thioglycolate content of 6½ per cent to 7½ per cent, with a PH of approximately 9.3 per cent [p. 653].

Appellant Lewis has continued to use the same formula [p. 659] and no complaints were made by anyone arising out of the particular batch No. 181 and *no one* ever claimed (other than plaintiff) that they had any *permanent loss or damage to their hair* [p. 659]. Mr. Stark of Rexall testified that in the handling of *all* Cara Nome products, about 400,000 a year, Rexall would average about 8 claims a year, allegedly due to cold waves [p. 642]. In all of these claims the only contention made was that there was a *breakage of hair* [p. 642]. *No claim was ever presented other than appellees,*[3] *for an alleged total, permanent and complete loss of hair* [p. 643].

B. The Plaintiff Sandra Mae Nihill.

On February 5, 1955, plaintiff was 13 years of age, and lived with her parents on a farm outside the small town of Kensal, North Dakota [p. 399]; population 350 [p. 539]. On that day plaintiff and her mother went to town and claim they purchased a kit of Cara Nome Natural Curl Pin Curl Permanent [p. 400].

Prior to this time plaintiff had been given other home permanents [pp. 199, 225]; one of them was a Toni, although she did not recall the type [p. 225]. Plaintiff

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[3]As might be expected with any preparation having such a tremendous market among American women, there are a few reported cases dealing with "thio." See for example: *Briggs v. National Industries,* 92 Cal. App. 2d 542; 207 P. 2d 110 and cases *infra.* No appellate decision in the United States has been found where a *complete permanent* loss of hair has ever been claimed to follow the use of this product.

claimed to have been in good health prior to February 5, 1955 [p. 199]. She denied any diseases of the skin [p. 199] or other illnesses requiring medical care [p. 199]. She was sensitive to sunlight and excoriated or scratched her skin often [pp. 613, 629]. This would tend to indicate allergy [p. 629].

She was in the eighth grade [p. 199] and about a week before February 5th was examined by Dr. Clarence S. Martin, for the high school, along with a number of other high school girls who were to play in a tournament [p. 311]. After the regular basketball season, the plaintiff was to participate in a basketball tournament between the various schools. A simple physical examination was made to plaintiff about a week before February 5th to determine if she could play [pp. 222-223]. Plaintiff wanted to look nice so she could play in the tournament [p. 230]. Dr. Martin, at that time, merely examined her heart, the appearance of her skin, the throat, checked for fever, blood pressure and general appearance [p. 319]. He kept no notes of this visit and did not examine her scalp. Prior to this visit, she showed no sign of allergy that he observed [p. 310]. This doctor did not at this time, or later, ever test plaintiff with any standard allergy tests or with any specific chemicals, cosmetics or soaps [p. 318].

No comprehensive tests of any type had ever been run on plaintiff prior to February 5, 1955. Her *true* systemic condition is unknown and the suggestion that she was a normal, healthy girl is based upon the kindly observation of her lay relatives, friends, and her small town family and school doctor. It is interesting to note that after July of 1955, a Dr. Melton, to whom the plaintiff had been referred by Dr. Martin of Kensal, prescribed for her a thyroid preparation [pp. 545, 271], which was dis-

continued, not by the doctor, but by the mother, because she thought it was making the girl too fat.

Expert medical testimony from Dr. Starr, also indicated that plaintiff had clinical evidence of a "hypothyroid" state [p. 575]; dryness of the skin and scalp, *overweight,* poor quality of the fingernails [p. 547], sparseness of hair [p. 554] are all symptoms of an underactive thyroid. It must be assumed that plaintiff's own doctor, Dr. Melton had these considerations in mind when he prescribed the thyroid for plaintiff.

C. The Cold Wave—The Administration.

After the purchase of the home permanent kit, plaintiff was given a permanent by a neighbor, Mrs. Briss. The mother timed the various steps. All claimed that the directions were followed to the letter, although actually the record demonstrates considerable failure of recollection in this regard, and much conflict. The instructions are set forth verbatim in Appendix B.

The home permanent is given in the following fashion:

1. The hair is shampooed[4] and then set in tight pin curls.

2. One half of the pin curl lotion is poured from the bottle into a clean glass or china dish, and with cotton or an eye dropper, each pin curl is saturated with the fluid.

3. There is then a wait of ten minutes, during which time the neutralizer is mixed in a glass bowl or jar by adding the powder to one quart of water.

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[4]No one knew what type of soap or shampoo was used [p. 238]. The evidence demonstrates that many soaps have a higher PH factor than the product in question. For an example of claimed injury from soap products, see *Worley v. Proctor & Gamble Mfg. Co.,* 253 S. W. 2d 532 (Mo. App.); *Proctor & Gamble v. Superior Court,* 124 Cal. App. 2d 157, 268 P. 2d 199.

4. At the conclusion of the ten minutes, the pin curls are again saturated with the remainder of the pin curl lotion in the same manner as previously.

5. There is another wait of ten minutes, at the conclusion of which a test curl is run. If the test curl shows wave ridges, the neutralization should immediately take place.

6. This process is accomplished by placing a fine net over the curls, rinsing or spraying several times with warm water and then blotting. Half of the neutralizer solution is poured into a clean bowl and with fresh cotton, each curl is saturated. This is followed by a 5 minute wait, after which the remaining neutralizing solution is poured through the hair, caught in a bowl, and each curl saturated with cotton. After this there is another ten minute wait, the hair is then thoroughly rinsed with water, blotted dry, and when completely dry, the pins, net and curlers are removed and the hair combed out. See instructions, Exhibit 1A, page 681, Appendix B.

The uncertainties of the plaintiff's recollection in regard to the manner of the application of the wave are clearly reflected in the transcript on page 264.

The testimony of Mrs. Jorgenson, aka Mrs. Briss, demonstrates an utter failure to follow the directions. She testified that according to the directions, she was to use half of the wave solution, first being dobbed on each individual pin curl [p. 298]. That after this she was to throw away whatever remained in the dish and add the other half of the bottle [p. 299]. That she was then to take the bowl, with the other half of the bottle, and *pour it all over the* head [p. 299].

This is contrary to the instructions and would constitute a wrong method of application. See testimony of Arnold Lewis [p. 666].

The importance of this testimony is obvious and apparent. It was the contention of plaintiff's counsel at the trial that in giving this testimony, Mrs. Jorgenson had reference to the neutralizer rather than to the pin curl solution. Certainly different inferences can be drawn. It may well be that actually the wave was given as described by Mrs. Jorgenson in the deposition, and that as a result, the hair was *never neutralized at all.*

It is significant that during the course of treatment there was no complaint of any burning sensation [pp. 237; 265]. The only complaint that plaintiff had was that "it was about two weeks or so after we got the permanent when I first noticed it coming out" [p. 212]. It started coming out when she combed it [p. 212]. There was no complaint of pain on the scalp [p. 361] either at the time, or during the period before she saw Dr. Martin on February 28. There was no complaint of itching or irritation of the scalp or eyebrows or eyelashes.

Finally, on February 28, 1955, 23 days after the alleged administration of the permanent wave, the plaintiff went to see Dr. Martin at Kensal [p. 311].

Dr. Martin's Treatment.

Dr. Martin did not examine any of the hairs under a microscope to determine whether any of the ends were frayed [p. 322]. He does not suggest that there was any *visible* evidence of damage to the hair shafts at that time. There is no suggestion of any splitting of the hair, or *breaking of the hair* [p. 361] or change in the color or texture of the hair. At first, the amount was not signifi-

cant, "Well, just when you put the comb through there would be *some* in the comb" [p. 267].

Dr. Martin's examination showed extensive loss of hair, some areas of inflammation, with *scaling*[5] and dermatitis [p. 310]. He examined her scalp with a Woods light and found no evidence of fungus and prescribed a *prescription* drug (Abbotts) known as Selsum *"for the treatment of Seborrheic dermatitis* [p. 311]. According to plaintiff's Dr. Melton, Selsum is not used in a case of chemical injury of the hair or scalp [p. 344]. He made *no tests* for any allergy and in particular did not test for allery with thioglycolate [p. 318]. Specific instructions were given to the plaintiff regarding the use of the product, Selsum [p. 320]. She was to apply it *once* a week, after a soap shampoo of the hair, massaged into the scalp for five minutes, allowed to stay there for that time, and then rinsed out, and then it is used again for another five minutes and allowed to stay there for that length of time and then rinsed out thoroughly with several rinsings of water so that you *do not leave* any of the medication on the scalp [p. 320]. The doctor conceded that Selsum *"could cause falling hair,* but *it is a medicine that is not to be left on the scalp* [p. 320].

Plaintiff did not see any doctor between her visit to Dr. Martin on February 28, 1955, and July 6, 1955, a period of over four months [p. 315].

Plaintiff used the Selsum *the same day* it was prescribed [p. 245] and continued to use it *until her hair was gone* [p. 247]. Despite the rather *explicit* directions from Dr. Martin as to the use of Selsum, the plaintiff could not re-

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[5]There is no evidence anywhere that "scaling," *i.e.,* dandruff, or Seborrheic dermatitis [p. 373] has ever been known to have been caused by thioglycolate [p. 359].

member if she washed her hair before applying it [p. 246]. She could not even recall the nature of the medication, *i.e.,* whether paste or liquid [p. 268]. She did not personally apply the Selsum, but it was applied by her eldest sister [p. 269] who was never called as a witness. *She could not recall how her sister applied it to the head* [p. 269].

It is interesting to note that on the occasion of the first visit to Dr. Martin he did not seriously regard her problem; did not make another appointment and did not see her again for over four months. There is nothing to indicate in Dr. Martin's testimony that *at the time* of his original treatment he was of the opinion that the thioglycolate was even remotely to blame for the condition which he discovered. There was never any history of a chemical burn, mild or otherwise. (See Testimony of plaintiff's Dr. Levitt) [p. 369]. The slight redness described by Dr. Martin on the occasion of the visit of February 28th, is *consistent* with seborrheic dermatitis, a condition which may have its onset at puberty [p. 551]. There is no evidence as to when this slight redness *first* developed before February 28.

In any event, after using the Selsum for at least four months in a manner which she was unable to describe at the trial, plaintiff returned to Dr. Martin on July 6th, 1955, who in turn referred her to a dermatologist, a Dr. Frank M. Melton [p. 324] at Fargo, North Dakota, who saw plaintiff on August 9, 1955.

At this time there was *no inflammation* of the scalp and no scaling of any consequence [p. 331]. There were some small pustules. The hair follicles were examined and found to be atrophic, *i.e.*: a shrinkage of tissue. No doctor suggested that thioglycolate did or could cause such a

condition. The doctor formed no opinion as to the permanency of this condition [p. 332]. By this time plaintiff's hair was in the condition reflected by plaintiff's exhibits A and B [p. 333]. Plaintiff lost her eyebrows, part of her eyelashes and the pubic hair was short, in varied size and there were plaques, that is, areas of almost complete loss of hair [p. 365]. It is conceded that the loss of eyelashes and eyebrows did not occur until the month of June 1955, or over four months after the alleged cold wave. At all times during the administration of the wave solution a towel was kept over plaintiff's forehead and eyes. To her knowledge none of the solution got into her eyes [pp. 231; 235].

Dr. Melton prescribed no allergy tests for plaintiff [p. 344]. He saw her on one subsequent occasion, September 21, 1955. He did, however, prescribe *thyroid* substance for her, which was discontinued by plaintiff's mother because Mrs. Nihill thought it was making plaintiff too thick through the hips [p. 545].

Later the plaintiff was seen in Minneapolis by Dr. Henry E. Michelson, who is regarded as an outstanding dermatologist [p. 610]. As plaintiffs counsel stated, he was "one of the best in the country [p. 125]. After her arrival in Los Angeles, she was examined by Dr. Harry Levitt for the plaintiff and by Dr. Harvey Starr, both dermatologists.

According to plaintiff her condition has remained practically stationary and she has at times used a wig.

The Medical Testimony.

Previously, only the barest facts have been set forth relating to the doctors so that the court would be able logically to follow the continuity of events. The medical

testimony consisted of the following doctors for the plaintiff:

(1) Dr. Clarence S. Martin of Kensal, North Dakota, who originally treated plaintiff on February 28, 1955, and treated her for seborrheic dermatitis. As to whether the plaintiff's condition was permanent, the doctor would only say that "I would feel there is more probability that this will be a permanent loss of hair than it will not be, although, I am in no position to say *definitely one way or the other.*" [p. 314].

On the question of the relationship, if any, between the home permanent, and the plaintiff's condition this doctor had the opinion that "Well, I would, my opinion is that this loss of hair *may well have been due* to the home permanent but certainly, *I do not feel it can be proven for sure, one way or the other.*" He was then asked more specifically, if the application of the cold wave solution *"could"* cause the condition he observed [p. 315]. To this question the doctor replied as follows: "I feel, from the presence of the inflammation in her scalp, and the absence of any evidence of fungus infection * * * that this condition which *I saw on her scalp and in her scalp may well have* been due to a chemical irritant such as you mentioned was in the home permanent" [pp. 315-316].

Dr. Martin was given *no information* in any question about the percentage of thioglycolate supposedly contained in the Cara Nome Cold Wave, and obviously, the patient never gave him such information.

(2) *Dr. Frank M. Melton,* a specialist in dermatology, practicing in Fargo, North Dakota, found that the plaintiff had lost her eyebrows [p. 327]. The hair

of the axilla (armpits) and the pubic hair was *sparse* [p. 327].

The doctor made a diagnosis of alopecia [p. 328]. He was asked, over objection as to whether [p. 336] thioglycolate can or cannot be harmful to the skin or scalp. He stated "It can be harmful in the sense that other allergic reactions can occur in concentrations that are used. Alopecia *may* occur and toxic reactions have been *reported*" [p. 337]. * * * On the toxic reactions there have been *controversial* studies on reports as to their exact nature [p. 337].

The doctor conceded that there was evidence "both for and *against*" the diagnosis of alopecia areata [p. 343]. The condition may involve only a part of the hair or it may extend and involve the whole head [p. 343]. The doctor was unwilling to state with reasonable medical certainty that the plaintiff *did not have alopecia areata* [p. 343], *i.e.,* loss of her hair from *unknown causes* [p. 344].

This doctor eliminated allergy from his consideration solely because there was *no other* symptom of allergy [p. 348] such as erythema or redness. The history was obtained by him from the *patient and her mother* and not Dr. Martin, who it will be recalled who did find the *presence of inflammation in plaintiff's scalp* [p. 315]. Dr. Melton conceded that loss of hair *could accompany an allergic reaction.*

(3) *Dr. Harry Levitt,* a dermatologist from Los Angeles examined [p. 351] the plaintiff for the purpose of testifying at the request of plaintiff's counsel [p. 352]. He had read the deposition of Drs. Martin and Melton [p. 352].

In his opinion plaintiff was suffering from *alopecia areata* [p. 353]. In his words, this "is a loss of hair, usually very sudden, which may be from a very small area to an almost complete loss of hair. Usually it is unattended by any changes except the sudden loss of hair. That is, there is no redness or scaling or itching, the hair just falls out" [pp. 353-354].

On the question of causation, the doctor was asked the following question [pp. 356-357]:

> Q. Doctor, based upon your experience and your education as a doctor; based upon the case history of this girl with which you have become acquainted; based upon the case history as given by the two attending physicians, and based upon your personal observation and examination of this girl, do you have an opinion, based upon reasonable medical certainty as to whether or not the original hair damage was caused by a chemical? Now would you give that opinion please, doctor?" [p. 356].

Over appropriate objection the doctor was permitted by the court to answer and stated: "I believe that a cold wave permanent *could* have caused the *original* loss of hair" [p. 357].

A motion to strike the answer was upon the ground that it was speculative and conjectural, was promptly made and denied [p. 357]. *No particular strength of solution* was mentioned in the question although appropriate objection was also made on this ground [p. 355].

This doctor was asked about the causes of alopecia areata and was of the opinion one of the causes was *tension* or *sudden emotional shock* otherwise the causes are *un-*

known [p. 358]. He felt that the loss of the hair could cause an emotional shock [p. 358]. His notes reflected the history however, that "There's no known tension and the patient stated she had little reaction to the fall of hair" [p. 362]. "I asked her how upset she was when her hair fell out and she said that *it didn't bother her*" [p. 362].

The doctor conceded that alopecia areata may come from many *unknown* causes, without history of shock or mental disturbance [p. 363]. His testimony in part follows:

> "Q. Now isn't it a fact, doctor, that a shock or excitement or nervous tension over a girl playing in a tournament, basketball can cause certain tensions, mental strain, anxiety, which could cause this condition? A. Possible.
>
> Q. *Its one of the causes,* isn't that correct? A. *That's correct*" [p. 364].

Dr. Levitt admitted that from the histories of the other doctors and his examination there *was no indication of any chemical reaction* [p. 370].

Dr. Levitt conceded that in teen-agers faulty action of the sweat glands will cause seborrheic dermatitis [p. 373]. Of importance is the condition of a person's body—his individual chemical makeup; his glands [p. 393]. One of the important glands is the *thyroid.* A classical picture presented by a patient with a thyroid problem in an increase in weight, lethargy, dry skin, dry hair and hair loss [p. 374], all of which the plaintiff had exhibited.

PLAINTIFF'S EXPERT TESTIFIED THAT HE BELIEVED PLAINTIFF WAS SUFFERING FROM ALOPECIA AREATA AND THAT THE CAUSE OF THIS CONDITION IN 25% OF THE CASES IS SUDDEN EMOTIONAL SHOCK [p. 362]. THE CAUSE IN THE REMAINDER OF THE CASES IS UNKNOWN [p. 363]. THE RECORD IS DEVOID OF ANY EVIDENCE OF KNOWN SUDDEN EMOTIONAL SHOCK TO PLAINTIFF.

(4) Dr. Henry E. Michelson of Minneapolis, Minnesota, examined plaintiff on behalf of the defense. He was a dermatologist, specializing in his field since 1918 [p. 611]. This doctor had never seen a case of *complete* loss of hair following a cold wave [p. 614]. He was of the opinion she was suffering from alopecia areata, *i.e.,* loss of hair of unknown cause [p. 619].

(5) Dr. Harvey Starr examined plaintiff in Los Angeles on behalf of the defense. He, likewise, read the depositions of the prior doctors [p. 544]. He was of the opinion that plaintiff was suffering from fragilitis crinium[p. 553]. "The hair is dry and is of uneven length; it's fragile, so that it breaks off. That's why the hair has that short, uneven appearance. There may be a slight amount of scale on the scalp. The skin of the body is generally dry and we do know that there are, with people who have this condition, usually have underlying, an underlying physiological explanation for it" [pp. 553-554].

ARGUMENT OF THE CASE.

I.

The Evidence Was Insufficient as a Matter of Law to Establish Any Actionable Negligence Against the Appellant Manufacturer and the Implied Finding of the Jury in That Regard Cannot Be Supported.

A. Preliminary Observations.

Appellant is familiar with the fundamental rule that ordinarily questions of negligence and proximate cause are questions of fact for the jury, on the other hand it is well settled that a verdict cannot be sustained if the essential facts necessitate conjecture and speculation.

Reese v. Smith, 9 Cal. 2d 324, 328;

Wilbur v. Emergency Hospital Assn., 27 Cal. App. 751;

Chesapeake & Ohio Ry. Co. v. Thomas, 198 F. 2d 783, 788.

When there is a complete *absence* of probative facts to support the conclusion reached, the appellate court will reverse the judgment.

Lavender v. Kurn, 327 U. S. 645, 653, 66 S. Ct. 744;

Moore v. Chesapeake & O. R. Co., 340 U. S. 573, 71 S. Ct. 428, 95 L. Ed. 547;

Looney v. Metropolitan R. Co., 200 U. S. 480, 26 S. Ct. 303, 50 L. Ed. 564;

Kansas City So. P. Co. v. Jones, 276 U. S. 303, S. Ct. 308, 72 L. Ed. 583.

B. The Concept of Actionable Negligence.

Actionable negligence involves the concept of a duty, and a breach of that duty proximately causing injury or damage to the injured party.

Smith v. Buttner, 90 Cal. 95.

> "These three elements—duty, breach and injury—when brought together constitute actionable negligence and the absence of any one prevents a recovery."
>
> *Means v. So. Calif. Ry. Co.,* 144 Cal. 473.

The modern rule, particularly insofar as it relates to cosmetic manufacturers, is well stated in Prosser on Torts (2d Ed., 1950) at page 503:

> "In the ordinary case the maker may also assume a normal user; and he is not liable where the injury is due to some allergy or other *personal*[6] *idiosyncrasy* of the consumer, found only in an insignificant percentage of the population. But, if the allergy is one common to any substantial number of possible users, the seller may be required at least, to give warning of the danger."

See also *Bennett v. Pilot Products Co.* (Utah, 1951), 235 P. 2d 525, 26 A. L. R. 2d 958 (1 in 1,000); *Briggs v. National Industries* (1949), 92 Cal. App. 2d 542, 207 P. 2d 110 (no showing as to number); *Walstrom Optical Co. v. Miller* (Tex. Civ. App., 1933), 59 Sw. 2d 895; *Barrett v. S. S. Kresge Co.* (1941), 144 Pa. Super.

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[6]Obviously the author draws a distinction between true allergies, as does the medical profession, and other personal reactions of a given individual, non-allergic in nature, but which nevertheless take the user out of the category of a "normal user."

516, 19 A. 2d 502; *Stanton v. Sears, Roebuck & Co.* (1942), 31 Ill. App. 492, 38 N. E. 2d 801. See Barasch, Allergies and the Law (1941), 10 Brook L. Rev. 363; Note, 1950, 49 Mich. L. Rev. 253.

It is well settled that the plaintiff has a two-fold burden:

1. The burden of proof is on the plaintiff to prove that the product was unfit for use on normal human beings, and that such unfitness was the cause of plaintiff's injuries.

2. The burden of proof is upon the plaintiff to show that she is within the category of a normal person insofar as the particular preparation is concerned.

The cases cited, both heretofore, and which are hereafter cited in this brief and in the appendices, amply support these statements.

Plaintiff has utterly failed in both respects.

Although Dr. Martin testified that plaintiff did not have any allergy that he was aware of, he made no allergy test. There was positive evidence that there was no chemical burn to the scalp (plaintiff's Dr. Levitt). There is no evidence that the hair is any more susceptible to the chemicals involved in the preparation than the scalp.

If in fact the plaintiff's condition was caused by the preparation, it must be obvious that it was some unusual and different reaction, whether based on allergy, idiosyncrasy, or peculiar susceptibility.

The rule is perhaps best stated in *Ross v. Porteous, Mitchell and Braun Co.* (Me.), 3 A. 2d 650, where the court stated at page 653:

> "In the case at bar, the cause of plaintiff's skin affliction on the evidence remains a matter of doubt and confusion. It may be that she was allergic to the

> dress shield or one or more of its component parts. . . . It is of course possible that the shields contain harmful and deleterious chemicals or substances, but they were not analyzed and if such be the fact, it has not been here established. We cannot resort to a choice of possibilities. That is guess work and not decision. . . . The plaintiff having failed to sustain the burden of proof . . . must be denied recovery."

Plaintiff produced no *expert* testimony, whatever, medical or otherwise indicating that appellant had failed in *any* respect to comply with the standards of the profession. No evidence was produced to show that batch No. 181 was manufactured any differently than any other batch. The "thio" content was clearly shown to be well within the permissible range of "3% to 10%" and the PH of the solution was normal; there is *no contrary evidence.* There was no evidence that the solution contained any poisonous or harmful substance to *normal users.*

> *Stanton v. Sears, Roebuck Co.*(Ill. App.), 38 N.E. 2d 801.

Plaintiff's mother, after she had consulted a lawyer in June and allegedly retrieved the original bottle [Pltf. Ex. 5], bearing the batch No. 181 from the ashcan [p. 466], went back to the same Rexall Drug Store and purchased another kit which likewise bore the same batch No. 181 [Pltf. Ex. 34, p. 467]. Despite the fact the plaintiff had in her attorney's possession prior to and at the time of trial, a full unused bottle of the pin curl lotion, no effort was made by plaintiff to have its contents analyzed; no request was made to the court for the appointment of a chemist to make an impartial analysis.

The evidence is clear that plaintiff did *not* experience the ordinary type of complaint found in an ex-

tremely small percentage of users, *i.e.,* breakage of the hair at the ends, with *no permanent* damage to the hair or permanent loss of hair.

Probably the best statements of the true rule may be found in the case of *Merrill v. Beaute Vues Corp.,* 235 F. 2d 893, where ammonium thioglycolate was involved. It was claimed that the plaintiff suffered, after the application of the cold wave, from an impairment of her vision due to a permanent injury to the optic nerve.

As the court states:

> "The plaintiff herein did not know that a usually harmless product could cause injury to her optic nerve. Until after the filing of the complaint the defendant had no knowledge of eye injuries to others, and then only two were reported. Under the circumstances, a warning would have been wholly ineffective" [p. 897].

In the same opinion, the court states:

> "The law requires a person to reasonably guard against probabilities—not possibilities . . . We therefore have the question as to whether a manufacturer, who places a product on the market, knowing that some unknown few, not in an identifiable class, which could be effectively warned, may suffer allergic reactions or other isolated injuries not common to the ordinary or normal person, must respond in damages. Although there are authorities to the contrary, we think the prevailing and better rule is that the injured person in such cases cannot prevail" [p. 897].

Appellant takes the position first, that in any event, plaintiff has not shown that her condition was caused by the preparation in question. This is fortified by the tes-

timony of her own physicians, particularly Dr. Levitt, who testified that she was suffering from alopecia areata and that the cause of this condition was known in about 25 per cent of the cases to be due to sudden emotional shock and was unknown in the remainder of the cases. There is not a scintilla of evidence in the record to indicate, what, if any, sudden emotional shock this plaintiff was exposed to. The loss of hair did not start to occur until a week to two weeks after the permanent wave and rather than being a sudden affair, was something that extended out over a period of four to five months. The history already quoted was to the effect that the girl was placid about the entire matter. Obviously, if the permanent wave solution did not cause the loss of plaintiff's hair, the appellant could not be held liable *under any circumstances.*

Even assuming that the loss of the hair might have been due to the permanent wave, it is respectfully submitted that this case falls squarely within the holding of the cited authorities. The evidence is practically uncontradicted that this is the only case of its type that had come to the attention of any of the witnesses, let alone the defendant manufacturer. It is obvious that there is nothing inherently dangerous in thioglycolate, from the evidence, which will produce the condition from which plaintiff now suffers. The only remaining conclusion that can reasonably be drawn from the evidence is that if there is any casual relationship at all between the cold wave and the alleged loss of hair, that it is one of those peculiar reactions in an individual not normally to be expected from the group of millions of women who use preparations of this kind.

Where the consumer has a reaction that is completely unforeseeable, the manufacturer cannot be held liable.

Mutual Life Ins. Co. v. Dodge, 11 F. 2d 486.[7]

II.

The Trial Court Committed Prejudicial Error in Instructing the Jury Over Appellant's Objection on the Doctrine of Res Ipsa Loquitur and in Any Event the Form of the Instruction on This Doctrine Was Prejudicially Erroneous.

Since plaintiff had failed to introduce any evidence to establish any negligence on the part of appellant manufacturer, plaintiff was forced to resort to the application of the doctrine of *res ipsa loquitur.*

Over the objection of appellant [p. 721], the court decided to instruct on the doctrine of *res ipsa loquitur.* The court in applying tte doctrine of *res ipsa loquitur* was clearly in error under either the North Dakota law, or the California law.

In the recent case of *Farmers Home Mutual Ins. Co. v. Grand Forks Imp. Co.,* 55 N. W. 2d 315, the Supreme Court of North Dakota held as a matter of law that the doctrine was inapplicable in an illuminating decision.

Preliminarily it might be pointed out that the court states:

> "Plaintiffs are clearly in error in their theory that the principle of res ipsa loquitur is available to establish *proximate cause.* In proper cases, where proximate cause is established, the doctrine of res ipsa lo-

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[7]A detailed analysis of the law relating to manufacturer's liability in the field of cosmetics is set forth in Appendix "C."

quitur comes into play to establish prima facie proof of negligence. The doctrine has no application to proximate cause and does not dispense with the requirement that the act or omission on which defendant's liability is predicated be established as the proximate cause of the injury complained of."

The North Dakota court recognizes that there are situations where positive, direct proof is lacking, and that,

"If the evidence of circumstances will permit a reasonable inference of the alleged cause of injury and exclude other equally reasonable inferences of other causes, the proof is sufficient to take the case to the jury. 65 C. J. S. (Negligence, sec. 244) 1091, 1092. If on the other hand, plaintiffs' proof is such that it is *equally probable the injury was due to a cause for which defendant was not liable a prima facie case is not established.* Meehan v. Great Northern Ry. Co., 13 N. D. 432, 101 N.W. 183; Balding v. Andrews, 12 N. D. 267, 96 N. W. 305; Heather v. City of Mitchell, 47 S. D. 281, 198 N. W. 353; Sears, Roebuck & Co. v. Scroggins, 140 F. 2d 718; Ingram v. Harris, 244 Ala. 246, 13 So. 2d 48; Law v. Gallegher, 197 A. 479, 9 W. W. Harr. 189 (39 Del.); Southern Grocery Stores v. Greer, 68 Ga. App. 583, 23 S. E. 2d 484; Potter v. Consolidated Coal Co., 276 Ky. 404, 124 S. W. 2d 68; Ingersoll v. Liberty Bank of Buffalo, 278 N. Y. 1, 14 N. E. 2d 828; Buxton v. Hicks, 191 Okla. 573, 131 P. 2d 1015; Simpson v. Hillman, 163 Ore. 357, 97 P. 2d 527, Houston v. Republican Athletic Ass'n, 343 Pa. 218, 22 A. 2d 715; Talley, et al. v. Bass-Jones Lumber Co. (Tex. Civ. App.), 173 S. W. 2d 276; C. D. Kenny Co. v. Dennis, 167 Va. 417, 189 S.E. 164.

* * *

"Taking all of the facts into consideration, that the fire did not start at the pan of gasoline, that the fire was not a typical gasoline vapor fire in that there was no explosion or flash back to the pan and that smoke was coming out of the east wall of the shop within a few seconds after the fire was noticed on the bench, we are satisfied that *it is at least as probable,* if not more probable that the fire was caused by a short circuit or some other unknown cause for which defendant has not been shown responsible than that it was caused by the negligent use of gasoline. Under the rule above stated therefore, plaintiffs have not made out a prima facie case. Accordingly, the verdict of the jury dismissing the action was correct." (Emphasis added.) (Pp. 317-318.)

This is basically the same rule that has been enunciated by the courts throughout the country and in California.

Zentz v. Coca-Cola Bottling Co., 39 Cal. 2d 436, 247 P. 2d 344.

In *La Porte v. Huston,* 33 Cal. 2d 167, the court held that the doctrine was inapplicable where:

"There was at least an equal probability that the accident was caused by some fault in the mechanism of the car, for which defendants were not liable as that it resulted from any negligent act or omission of the mechanic. Accordingly it cannot be said that it is more likely than not that the accident was caused by the negligence of the defendants, and hence the case was not a proper one for the application of the doctrine of res ipsa loquitur"(p. 169).

See also:

Redfoot v. J. T. Jenkins Co., 138 Cal. App. 2d 108, 291 P. 2d 134;

Spencer v. Beatty Safway Scaffold Co., 141 Cal. App. 2d 875.

It has been said that the doctrine in any event will not apply where the cause of the injury is left in the realm of conjecture or speculation.

Tedrow v. Des Moines Housing Corp., 87 N. W. 2d 563 (Iowa, 1958);

Rollins v. Avery, 296 S.W. 2d 214 (Ky. App., 1956).

One of the most important facets of the doctrine of *res ipsa loquitur* has always been the element of control. It is the fact of control by the defendent which presumably gives the defendant more information with reference to the cause or possible cause of the accident than the plaintiff.

La Porte v. Huston, 33 Cal. 2d 167, *supra.*

It has been held that the doctrine cannot apply where the plaintiff had a hand in mixing the particular solution involved.

Simmons v. Rhodes & Jamieson, Ltd., 46 Cal. 2d 190, 293 P. 2d 26;

Phillips v. Noble, 152 A. C. A. 76, 313 P. 2d 22.

Last but not least is the fundamental requirement that the injury or condition must not have been due to any fault or contribution on the part of the plaintiff.

Danner v. Atkins, 47 Cal. App. 2d 327, 303 P. 2d 724.

In the light of the foregoing principles, it is submitted that the trial court committed *fundamental* error in giving the instruction on *res ipsa loquitur.*

1. There is no evidence of any difficulty or problem arising at the time of the giving of the cold wave, no burn, irritation or immediate inflammation; no breaking of the hair or discoloration of the hair or any of the usual or ordinary aftermaths of either a misapplication of the wave solution or a typical allergy or idiosyncrasy.

2. No loss of hair occurred for at least a week or two following the cold wave, and then only when the hair was combed.

3. No doctor was seen until 23 days after the alleged permanent.

4. The use by plaintiff of selsum, a prescription drug, *known to be capable of producing hair loss,* from February 28, for almost four months, without further medical check, and with absolutely no evidence that the detailed directions of the doctor for its use, were followed by the plaintiff.

5. The fact that the plaintiff's eyebrows and eyelashes came out, not immediately, or at the time the hair started falling out, but around the middle of June [p. 412]. This combined with the sparseness of the pubic hair, was evidence which tended to demonstrate that plaintiff's hair loss was entirely unrelated to the cold wave. The medical testimony of the plaintiff revealed at best only the *possibility* that the cold wave *could have caused the condition.* The testimony of plaintiff's expert, Dr. Levitt, indicated that plaintiff was suffering without question from alopecia areata, and that in 75 per cent of the cases the cause of this condition was unknown, occurring to individuals in all age groups, *from infants to adults.*

6. The fact that the plaintiff admittedly had received a prescription for thyroid and that there was evidence of a possible hypothyroid condition, a systemic condition which in and of itself, along with brittle finger nails, and dry skin, would tend to indicate a systemic problem.

It is submitted that the case falls squarely within the language of the Supreme Court of North Dakota in the case of *Farmers Home Mut. Ins. Co. v. Grand Forks Imp. Co., supra,* where it is pointed out that where it is equally probable that the injury was due to a cause for which the defendant is not liable, a *prima facie* case is not established and the doctrine of *res ipsa loquitur* is inapplicable.

It is difficult for appellant to understand how there can be any balance of probabilities pointing toward the negligence of the defendant manufacturer when the plaintiff's own doctor, Dr. Clarence Martin, testified he did not feel that the loss of hair could be proven for sure *one way or the other* to have been due to the home permanent wave.

It is difficult for appellant to understand how there can be any balance of probabilities pointing to the negligence of the appellant manufacturer when the plaintiff's Dr. Levitt testified that except for emotional tension and shock, which exists in about 25 per cent of the cases of alopecia areata, its causes are unknown.

Even assuming that tension and shock might be a precipitating factor in alopecia areata, is there any balance of probabilities pointing to a minimal loss of hair, a week or ten days after the alleged cold wave, as being the precipitating factor, as opposed to the tension involved in the anticipation of playing in a school basketball tournament?

Appellant cannot understand how there is any balance of probabilities in favor if its negligence in the face of the

uncontradicted testimony concerning the use of selsum, a prescription drug, for a period of over four months, without further medical supervision and under circumstances failing to indicate a strict or any compliance with the doctor's carefully given orders relating to its use.

These and other factors which have been heretofore pointed out, compel the conclusion that the giving of the instruction on *res ipsa loquitur* was prejudicial error. In any event, the form of the instruction was erroneous. The court, in part, in dealing with the subject matter of *res ipsa loquitur,* instructed the jury as follows:

> "It is your duty to consider and make up your verdict from all of the evidence in the case, taking into consideration the rule of evidence that I will now give you. That rule of evidence is known as res ipsa loquitur, that is to say, the thing speaks for itself, and that rule of law is recognized by the Courts as the law *in cases similar to this* . . ." [pp. 771-772]. (Emphasis added.)

The particular vice of this instruction, aside from its inapplicability in the first instance, arises by reason of the use of the sentence, "and that rule of law is recognized by the Courts as the law *in cases similar to this,*" because the suggestion is plainly made to the jury that there are cases which are similar to the one in question. It suggests to the jury that there are or were cases which were similar to the one in question. "Similar" has been defined as follows:

> "Nearly corresponding, having a general likeness, . . . Similar implies an impossibility of being mistaken for each other." (See Webster's New Collegigate Dictionary.)

Obviously, the jury may well have been of the opinion that there were cases which were in the law and which were recognized by the law as unmistakably the same as the case at bar, when the evidence in the case from all of the medical doctors was to the effect that they had never seen a case similar to the plaintiff's, which anyone had even claimed had been caused by the application of thioglycolate or any other chemical preparation contained in the cold wave and where millions of these waves have been given without untoward result.

The effect of the use of this language was to render the instruction highly prejudicial to the rights of this defendant under the circumstances.

It is well settled that instructions which are confusing or misleading or which embody propositions of law on which there was no evidence, are erroneous.

See:

McCarthy v. Pa. R. Co., 156 F. 2d 877.

III.

The Trial Court Committed Prejudicial Error in Instructing the Jury on the Liability of a Manufacturer of a Product Which Is Inherently Dangerous.

The trial court charged the jury as follows:

"You are instructed that the manufacturer of a product that is either inherently dangerous or reasonably certain to be dangerous if negligently made, owes a duty to the public generally and to each member thereof who will become a purchaser or user of the product. That duty is to exercise ordinary care to the end that the product may be safely used for the purpose for which it was intended and for any purpose

for which its use is expressly invited by the manufacturer. Failure to fulfill that duty is negligence" [p. 773].

Appellant specifically objected to the giving of this precise instruction. [P. 733]. A proper instruction correctly defining appellant's liability was requested [p. 47].

A manufacturer is only required to exercise *ordinary* care in connection with the manufacture of its product.

See:

Prosser on Torts (2d Ed.), p. 497, and collected cases.

Rather than instruct the jury on the fundamental obligation of a manufacturer, the trial court gave the challenged instruction. Any juror hearing the instruction would necessarily assume that it was the feeling of the court that the product was inherently dangerous. There is not one scintilla of evidence in the record that the Cara Nome home permanent pin curl preparation was inherently dangerous, whether negligently made or otherwise. The chemical ammonium thioglycolate, which is contained in the home permanent wave kit, is customarily used by manufacturers in percentages varying from 3 per cent to 10 per cent, depending upon the purpose for which it is intended. There is not one word of testimony that a solution of 3 per cent or 7 per cent or 10 per cent or 20 per cent, even, would make this particular preparation one which was inherently dangerous in its use. There is no testimony that thioglycolate in *any* particular percentage would cause, or has been known to cause, on any scientific basis, the death or complete loss of hair.

It is fundamental that instructions which are misleading and which assume facts which are not justified by the

evidence, may be prejudicial. The prejudicial effect must be determined from the overall picture of the case.

The jurors came back at one stage of their deliberation and requested that the court read certain testimony. This the court refused to do. The particular testimony related to the preparation in question, and the colloquy was as follows:

> "Mr. Thomas (the Foreman): The juror is under the impression that Mr. Lewis didn't have any formula for this pin curl and I guess he wants it read out of the record just what the testimony was on that. Is that right?
>
> The Court: Well, it can be stipulated, can it not, that there was proof of a formula used by Mr. Lewis?" [pp. 800-801].

Counsel refused to stipulate and thereafter the court refused to permit the reading of the record in this regard, although appropriate request was made and exception duly noted.

The significance of this colloquy is extremely important in the light of the instruction. The jury could well conclude that it was the court's feeling that whatever the formula may have been, that the product was one which was inherently dangerous.

Mr. Lewis testified that he at all times manufactured the pin curl permanent under a formula and that he had not changed or altered that formula since October 22, 1954 [p. 596]. He further testified that the preparations were made pursuant to a licensing agreement under the McDonald patent, whereby Lewis was furnished with the formula, "to be used in this particular solution." He had already testified on a prior occasion as to the components

of the particular solution, which is in evidence as an exhibit, and he testified that as a manufacturer, he was familiar with "the formulas" [p. 653].

In other words, this was not a hit and miss operation whereby some chemist would throw together chemicals in a fashion merely to suit himself, but was based upon a rigid adherence to certain formulas which were given to the manufacturer pursuant to the leasing agreement.

The question asked by the juror indicated some uncertainty in this connection and merely points up the error of the court in giving the instruction on the doctrine of a preparation that was inherently dangerous, when there was no proof in that connection.

Even though the plaintiff may have had as a theory, that the preparation was inherently dangerous, it was incumbent upon the plaintiff to prove that fact. No evidence was introduced by plaintiff or defendant which would indicate or tend to indicate that ammonium thioglycolate was inherently dangerous to human beings.

Particularly in point is the case of *Merrill v. Beaute Vues Corp.,* 235 F. 2d 893, *supra,* where the court points out that one who delivers to another an article which is poisonous or contains ingredients which are intrinsically dangerous to human life or health, is responsible. The court states at page 895:

> "We have examined the record and are of the view that the evidence is *insufficient* to permit recovery under this rule.
>
> There was evidence of injury to plaintiff's optic nerve. The attending physician testified that in his opinion the use of defendant's products *caused* plaintiff's illness and permanent injury to the optic nerve,

resulting in impaired vision. He did not testify that the product was inherently poisonous, dangerous or likely to injure anyone who used it." (Emphasis added.)

Under this state of the case the court could find *no liability*. It is interesting to note that the plaintiff's doctor in the *Merrill* case had expressed the unqualified opinion that the plaintiff's injuries were *caused* by the defendant's product.

In this case, plaintiff's Dr. Martin testified merely that the condition which he observed on the plaintiff's *scalp "may* well have been due to a chemical irritant, such as you mentioned was in the home permanent" [p. 316].

Plaintiff's Dr. Frank Melton, a dermatologist, merely testified that ammonium thioglycolate, as such, "in certain concentrates" can be harmful in the sense that other allergic reactions can occur in concentrations that are used. Alopecia may occur and toxic reactions have been reported" [pp. 336-337].

Again parenthetically, it may be pointed out that no particular percentage of concentration of this preparation was given to Dr. Melton *or any of the witnesses*.

3. Plaintiff's Dr. Harry Levitt, a dermatologist who examined plaintiff in Los Angeles shortly before the trial, and many months after the administration of the cold wave, testified that the cold wave permanent in his opinion "could have" caused the original loss of hair.

4. Dr. C. E. P. Jeffreys, a consulting chemist, testified that cold wave solutions may contain as small amount as 3 per cent of thioglycolate and as high as 10 per cent [p. 590]; that the usual normal range was "of the order of

7%" [p. 591]. This witness made a chemical examination of the particular batch, No. 181, from which the plaintiff claimed the pin curl originated and found that it contained 6.94 per cent thioglycolic acid [p. 591]. The PH factor in connection with this particular solution, batch No. 181, was 9.2 [p. 592]. The witness pointed out that actually the cold wave solution as placed upon the market, is alkaline rather than acid. In other words, although the active ingredient is a salt of thioglycolic acid, the acid, when combined with ammonium in a water solution, will give an alkaline reaction [p. 592]. The witness pointed ont that soaps normally have a PH factor of around 10, or higher, or stronger, alkaline content than the normal cold wave solution. There is nothing in the evidence that would even remotely suggest that the cold wave solution or any of its component parts was inherently dangerous to exterior skin or scalp or hair of human beings, and for the court to have given this instruction in the face of a *total lack of evidence on this subject matter,* was fundamental error, and highly prejudicial to the rights of the appellant.

It is well settled that no instruction should be given which assumes as a matter of fact something which is not conceded or which is not afforded by the evidence.

Howard v. Cinn. Sheetmetal and Roofing Co., 234 F. 2d 732.

IV.

The Trial Court Committed Prejudicial Error When It Permitted the Reading Over Appellant's Objection of the Depositions of Mrs. Donald Carlson and Mrs. Carl Carlson, Where There Was No Foundation Laid to Show a Sufficient Similarity of Conditions.

The plaintiff through her attorney commenced to read the depositions of Mrs. Donald Carlson, a neighbor of the plaintiff, which was taken in Jamestown, North Dakota. Immediately defendant's counsel objected to the in troduction in evidence of this testimony or to a further reading of the deposition [p. 448]. An adjournment was taken and the matter was discussed in chambers. After a rather lengthy discussion, the trial court stated:

> "I am inclined to—Mr. Lanier, plaintiff's attorney, seems to be so very confident of his right here personally, I think it would be a *reversible error* to *let them in,* but if it is improper, Mr. Lanier, I'm—In these matters it is never very wise to rely upon the elemental nature of a question of that sort unless it is important. If you insist on reading it, Mr. Lanier, I will let you read it" [p. 457].

Although the trial court was obviously dubious about the admissibility of this testimony, the importance of the testimony from the standpoint of the trial court was quite plain. The court stated, "I said if I was in error about it, it would be *reversible error,* in permitting it to go in" [p. 458].

After considerable more colloquy, the trial court finally decided that it would not permit the reading of the depositions and the offer was denied.

Shortly thereafter plaintiff rested her cause, but the following morning, plaintiff made a motion to re-open her case for the purpose of offering the depositions of Mrs. Carl Carlson and Mrs. Donald Carlson [p. 475].

Further objections were made to the introduction of these depositions [p. 476]. Basically the objections were upon the ground that there was no proper foundation laid for the introduction in that it was not shown that the kits purchased by the two witnesses were the same type of kits or that they contained the same concentration of chemicals. That the depositions showed that an entirely different type of condition developed in each of these women following the alleged use of the preparation; there was no evidence as to the condition of the hair of the two women [p. 481], *i.e.,* whether it was bleached or tinted hair, or to what extent they had followed or deviated from the instructions, or whether they were suffering from any other condition which might have caused the problem related by them.

After this lengthy argument and objection, the trial court finally stated:

> "Mr. Lanier, I sat here and pondered over the thing. I think it is a little doubtful whether you are entitled to have those in or not. It is your case and you are insisting very strongly, and I would hate to deprive your client of a right that would result in her receiving injustice in this court. *Upon your insistance,* I am going to admit those depositions. That was my original ruling and I was so doubtful about it that I excluded them, and now upon your authorities and upon your insistance, I am permitting them to go in and permitting you to read them" [p. 482].

Thereafter both appellants, and at the close of all of the evidence, again moved that the testimony of both Mrs. Donald Carlson and Mrs. Carl Carlson be stricken [pp. 754-755]. This motion was denied.

The action of the trial court in permitting the reading of these depositions was prejudicially erroneous.[8]

Mrs. Donald Carlson testified that she bought a Cara Nome home permanent set at the Kensal Rexall Drug Stores some time in March of 1955 [p. 527]. She did not describe the type of home permanent kit that she bought. She claimed that after the permanent wave, her hair was strawy and dry and the ends were funny colored, more or less they were lighter on the ends than they were at the scalp. The ends were split and she finally had her hair cut [p. 528]. She noticed nothing unusual about the smell other than it was similar to most permanent solutions [p. 529]. She did not notice any difference in the effect of the solution on her hands as compared to other home permanent wave solutions that she had used. She suggested that it rusted the bobby pins. At the time her deposition was taken she had a *full head of hair* [p. 531].

Mrs. Carl Carlson testified that she also purchased a Cara Nome permanent kit. She noticed that after the wave her bobby pins were rusting and she seemed to have two colors of hair. Some of the hair broke off [p. 535]. She had her hair *cut and had no further problem* [p. 537].

The introduction in evidence, over what was obviously the trial judge's better judgment, was extremely preju-

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[8]It might be pointed out that over objection plaintiff's counsel in his opening statement told the jury that the two Carlson women "lost their hair at approximately the same time" [p. 138]. Neither deponent made any such claim.

dicial to the appellant manufacturer. There was absolutely no evidence foundationwise as to the character or condition of the hair of these two women. There is no evidence as to the systemic condition of either of these women. Although they stated that they had followed the directions meticulously, there is no evidence as to which one of the many types of Cara Nome permanent kits they actually purchased. Neither of them claimed to have any irritation or inflammed scalp afterward; neither claimed to have any type of skin condition or dermatitis or scaling of the scalp or dandruff; the manner in which the hair broke at the ends was completely different from that which was described by the plaintiff. Both women testified that some hair came out when it was combed, but there is nothing to indicate that either one of them had any patchy areas where the hair fell out, or that after a matter of weeks, their hair had not returned to normal. The only treatment given was to cut the hair. At the time of the taking of the depositions, both women had a full head of hair [pp. 531, 537]. There was absolutely *no evidence* in any event, that the wave solution used by the two women was from batch No. 181.

The evidence was uncontradicted that whatever problem developed with reference to the plaintiff's hair, it was entirely different in character and nature from the transient condition described by the Carlsons.

V.

The Damages Awarded by the Jury Were Grossly Excessive in Any Event.

Assuming, *arguendo,* that there is sufficient evidence to support the verdict and judgment on liability, the amount of the award was grossly excessive.

The photographs reveal the plaintiff with a stubble of hair over her entire scalp. There is no evidence of scarring on the surface of the scalp. There was no evidence of a chemical burn that would destroy scalp tissue or the hair follicles.

Dr. Martin testified that he was in no position to say definitely one way or the other whether the plaintiff's loss of hair would be permanent [p. 314].

Dr. Levitt, it will be recalled, made a diagnosis of alopecia areata. He stated that most cases of alopecia areata recover a full growth of hair [p. 391]. There is nothing in his testimony, medically, which would give any reason for the suggestion that this plaintiff will not recover eventually the full growth of her hair.

There was ample defense testimony that the girl was obviously suffering from some systemic condition. Plaintiff's own doctor, Dr. Melton, must have recognized this when he prescribed thyroid for the girl. An underactive thyroid is characterized in part by a dryness of the skin, a loss of hair, and a brittleness of the finger nails. All of these conditions were found in this particular plaintiff. There is every reason to believe that with the passage of

time and the elimination of her systemic problems, she will regain the full growth of her hair.

Appellant suggests that in the face of the paucity of evidence and the uncertain and conflicting character of the testimony, that the award of $48,000 for the plaintiff's condition is grossly excessive and that even if the verdict and judgment should be affirmed, that this court should order a remission of a substantial portion of the award.

VI.

The Court Erred in Denying Appellant's Motion for a Judgment Notwithstanding the Verdict.

It should be apparent from the discussion which has preceded in connection with the previous points that there is not a scintilla of evidence of negligence on the part of the appellant manufacturer. There is no legal basis for the application of *res ipsa loquitur* to this case. Under these circumstances the imposition of liability by a lay jury was obviously based upon sympathy, passion, prejudice, or upon the rankest kind of speculation. For the reasons that have heretofore been pointed out, it is submitted that the trial court committed error and that this court, in accordance with its power, should order the judgment reversed and should grant the appellant's motion for a judgment notwithstanding the verdict.

Conclusion.

It is respectfully submitted that the utter failure to establish any probative facts revealing any negligence on the part of the appellant manufacturer, compels a reversal of this cause. That in any event, the action of the trial court in instructing the jury in the manner heretofore referred to was prejudicially erroneous and when coupled with the erroneous introduction in evidence of the depositions of Mrs. Donald Carlson and Mrs. Carl Carlson, was undoubtedly responsible for a grossly excessive verdict which has no evidentiary support, and this court should enter judgment notwithstanding the verdict.

Respectfully submitted,

REED, CALLAWAY, KIRTLAND & PACKARD,

and

HENRY E. KAPPLER,

Attorneys for appellant Arnold L. Lewis, doing business as Studio Cosmetics Company.

APPENDIX "A."

List of Exhibits Offered and Received.

Exhibit Number	Page in record where identified	Page where offered and rejected	Page in record where offered and admitted
1	165		165
2	168		197
3	169		
4	172		173
5	174		
6	179	180	
7	186		203
8 to 25, incl.	190		495-496
26	192		196
27	192		
28	203		204
29	205		206
30	284		285
31	284		285
32	285		286
33	285		286
34	460		467
	DEFENDANT'S EXHIBITS		
A	367		685
B	640		641
C, D, E, F	652		652
G	655		656

APPENDIX "B."

CARA NOME

Natural Curl
BRAND

CARA NOME NATURAL CURL PERMANENTS
are custom made for every type of hair.

REGULAR — for normal hair

DYED OR BLEACHED — for dyed, bleached or damaged hair

GRAY OR WHITE — for silver or white hair

FOR LITTLE GIRLS — especially prepared for little girls' hair

PIN CURL PERMANENT — for softer, more casual waves

CARA NOME NATURAL CURL PERMANENTS are easier, quicker, safer; because they all contain Natural Curl's special conditioner to buffer the waving action, making it faster, yet more gentle. Choose the right kit for the wave you want, and you'll be delighted with soft, natural waves from the very first day!

For a casual, soft, natural-looking wave, use Cara Nome Natural Curl Brand Pin Curl Permanent.

Waves, sets, styles the hair all at once!
Saves time — saves resetting.

As easy as setting your hair in pin curls — so easy you can do it yourself!

Perfect timing control, because pin curl lotion is applied to all the curls at same time.
Soft, manageable curls set in your own hair style as soon as you finish the wave!

Cara Nome Natural Curl Brand Pin Curl Permanent will last for weeks, but if a tighter, longer-lasting wave is what you want, it is recommended that you use a Cara Nome Natural Curl Permanent with curling rods.

If your scalp is sore, irritated or scratched, postpone your wave until this condition is corrected. If your hands are chapped, sore, cut, or especially sensitive, wear rubber gloves while giving the wave.

Keep pin curl lotion tightly capped at all times.

Don't leave pin curl lotion or neutralizer where children or pets may get them. They must not be taken internally.

Wait at least two months between permanents. Trim off ends of old permanent for a softer, prettier wave.

The Bobby Pins supplied in this package are specially treated and should be used only once in giving a pin curl permanent.

Use only new enameled bobby pins or aluminum curl clips if you need more curls.

Pin curl lotion may turn purple when it touches some bobby pins, but neutralizer will correct this.

Don't use any coloring products on your hair for at least a week before or after a permanent wave.

NOTE: If the hair has been bleached, dyed or damaged in any way, it is best to take 2 test curls. In giving the test curl, follow the instructions for a complete wave, using only a small portion of the pin curl lotion for this purpose. (Re-cap pin curl lotion tightly after using.)

If the curls are springy and resilient, proceed with the rest of the hair. If not, it is best to postpone the wave until this condition is corrected.

CARA NOME NATURAL CURL GRAND PIN CURL PERMANENT KIT, complete with Pin Curl Lotion, "Neutralock" Neutralizer, Bobby Pins, Plastic Neckline Curlers and End Papers.
CARA NOME CONCENTRATED SHAMPOO or other good quality shampoo.
A clean quart bottle or jar.
A pitcher or hair spray for rinsing.
Small china or glass dish
Comb, hair net, absorbent cotton, bath towels.
Alarm clock or timer
Trim ends of hair and shape

Shampoo just before your wave. Use a good quality shampoo; rinse well with plain, warm water, and towel dry gently. Start the wave when the hair is just barely damp.

You might like to try setting your hair in this casual, becoming fashion.

Make top pin curls first, dampening the hair very slightly with water.

Notice the direction in which the curls are wound.

Set curls on both sides as shown, turning them down and toward the face.

Set back hair, leaving space for plastic curlers at neckline.

Follow these simple directions...

After shampooing, and while the hair is still slightly damp, set hair in small, tight pin curls (see illustrations 1 to 4). Pin your hair up in the pattern you use for your favorite hair style.

DO NOT APPLY WAVING LOTION YET. If the hair becomes too dry to pin curl, dampen with a little plain water.

For the neckline area, it is best to use the plastic neckline curlers supplied in the kit. Their use will produce a stronger, more lasting curl in this part of the hair which is usually resistant and a little harder to wave. (Illustrations 5, 6 and 7 illustrate how to wind hair on neckline curlers.)

Pour *half* of the pin curl lotion into a clean china or glass dish. Use clean cotton (or an eye dropper) to wet each pincurl and neckline curler with pin curl lotion. Be sure every curl is thoroughly saturated. Use fresh cotton to wipe away any lotion that runs onto the scalp or skin.

NOW START TIMING

Throw away any lotion that is left in the dish. (The half in the bottle will be needed later.)

While you are waiting mix the neutralizer solution by following the instructions printed on the neutralizer envelope as follows: Add contents to one quart LUKEWARM water and mix to dissolve. Prepare solution in a jar or bottle JUST BEFORE USING AND DO NOT COVER OR PLACE CAP ON MIXTURE.

After the first 10 minutes have elapsed, wet all the pin curls and the neckline curlers again, using all of the remaining half of the pin curl *lotion*. Saturate all of the curls several times. Wipe away excess lotion again.

Now partly unwind one of the plastic curlers. Place one hand under it and gently push it up toward the scalp. If the wave pattern looks limp, rewind it; wait 5 minutes and test again using a different curl (never leave waving lotion on the hair for longer than 30 minutes from the start of timing.) When the test curl shows definite wave ridges, neutralize immediately, according to the following directions.

To make pin-curls

1. Part off a small section of hair (not more than an inch square at the scalp). Comb through.

2. Wrap the strand around the index finger. The curl should be small — not any larger than a dime.

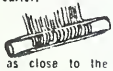
3. Slide the curl off, keeping the ends in the center of the loop. Twist fingertip to tighten curl.

4. Pin flat against the scalp with a bobby pin from this kit. The curl should be a perfect spiral with the tip-ends of hair in the center.

For neckline curlers

5. Part off a section of hair about the width of the curler and one-half inch deep. Comb smooth. Fold end paper over the hair strand and slide it down until ends of hair are all covered.

6. Place a plastic curler under the end paper and wind toward the scalp, turning curler under. Be sure hair is evenly distributed — not bunched on the curler.



7. Fasten as close to the scalp as possible

Wave looks limp, rewind.

Distinct wave ridges. Neutralize immediately.

Fasten a fine mesh net tightly over all the curls and gently rinse or spray with warm water for several minutes. Blot with a dry towel to remove excess moisture. Now pour *half* of the neutralizer solution into a large, clean bowl and with fresh cotton saturate every curl thoroughly with neutralizer solution. Press the neutralizer solution into each curl 3 or 4 times. Throw away the used neutralizer solution.

WAIT 5 MINUTES

Now pour the remaining neutralizing solution through the hair, catch it in a bowl and use fresh cotton to saturate all the curls repeatedly.

WAIT 10 MINUTES

Rinse thoroughly with water and blot with another clean towel. Leave the curlers up under the net until dry. Use a hair dryer if you wish. When completely dry, remove net, pins and curlers; and brush into your favorite hair style.

APPENDIX "C."

Liability of Manufacturer of Cosmetics for Negligence.

1. The effect of a special sensitivity of the consumer on the liability of a manufacturer to that consumer on a theory of negligence.

a. *Prosser on Torts,* 2d Ed. No. 84, p. 503 says: "In the ordinary case the maker may also assume a normal user; and he is not liable where the injury is due to some allergy or other personal idiosyncrasy of the consumer, found only in an insignificant percentage of the population."

Authorities in support are the following:

(a) *Walston Optical Co. v. Miller,* 59 S. W. 2d 895 (Tex. Civ. App., 1933). [2] Where a buyer of eyeglasses sustained injuries caused by dye on the glass frames and the dye was harmless to ordinary persons, injuries being due to some idiosyncrasy of the buyer's skin, the buyer could not recover against the seller of the eyeglasses in an action for negligence.

(b) *Barrett v. S. S. Kresge Co.,* 144 P. Super. 516, 19 A. 2d 502 (1941). [4] Where a dermatitis which a buyer suffered after wearing a dress was due to her individual allergic nature, and the dye in the dress was not harmful to the normal person, the seller of the dress was held not liable to the buyer under the provisions of the Pennsylvania Sales Act (Uniform Sales Act No. 15) relating to *implied warranty* of fitness. In accord with Barrett on almost identical facts is the case of *Stanton v. Sears Roebuck & Co.,* 312 Ill. App. 496, 38 N. E. 2d 801 (1942). The *Stanton* case also held that the *burden of proof* is on

the plaintiff to show that the dyes in the dress were poisonous or contained any harmful ingredient.

(c) *Briggs v. National Industries, Inc.,* 92 Cal. App. 2d 542, 207 P. 2d 110 (1949). P appealed from a judgment n.o.v. granted on motion of D after the jury had returned a verdict for P. P, a customer in a beauty shop, received an application to her hair of D's product "Helene Curtis Cold Wave." Some of the waving solution came in contact with P's forehead, side of her face and right forearm. Three days later she developed a severe dermatitis of the skin around her face, neck, ears and shoulders; and P sued the manufacturer on the theory that it had negligently failed to warn the public or intended users of their product that it contained a chemical toxin known as thioglycolate, and that many persons were susceptible to and might suffer serious damage through its use.

A physician (dermatology specialist) testifying for P stated that thioglycolic acid is a direct irritant if used in concentration over seven or eight per cent. (It was stipulated in this action that the solution used in D's product was 6.28 per cent.) He also testified to the effect that P had a more tender skin than the average person; that she had been vaccinated for smallpox a short time previously to the development of the skin irritation, and that there was a definite possibility that the vaccination could have increased P's sensitivity to the solution used. The appellate court HELD: Judgment for D affirmed. The court says, 92 Cal. App. 2d at page 545: "It was not shown that the solution used on plaintiff *was in fact dangerous* or an irritant to the skin of any person any more

than many cosmetics, face powders, cold cream and nail polish universally used by women. There is nothing in the testimony indicating that many persons were susceptible to the product and might suffer damage through its use. *In fact, from the record, plaintiff's complaint is the only instance in which injury from it was claimed."*

And at page 546: "The general rule is that a manufacturer must give an appropriate warning of any known dangers which the user of his product would not ordinarily discover. One of the essential elements of liability is knowledge on the part of the manufacturer of the dangerous character of the product. There is no substantial evidence that the defendant corporation had any such knowledge. We find no merit in plantiff's contention that the defendant corporation was required to warn the public that great care should be taken in the application of the product."

(d) *Bennett v. Pilot Products Co.,* 235 P. 2d 525, 26 A. L. R. 2d 958 (Utah, 1951).

(e) *Worley v. Proctor & Gamble Mfg.,* 253 S. W. 2d 532 (Mo. App.).

(f) *Bish v. Employers Liab. Assur. Corp.,* 236 A. 2d 62.

2. Basis for denying recovery to hypersensitive or allergic or user with peculiar reaction.

a. That consumer's hypersensitivity was so unforeseeable that the vendor, as a reasonable man, could not anticipate the harmful consequence of selling his product (*Mutual Life Ins. Co. v. Dodge,* 11 F. 2d 486 (1926); *Wheeler v. T. G. & Co.,* 265 Mich. 296, 251 N. W. 408

(1933); *Arnold v. May Dept. Stores Co.,* 85 S. W. 2d 748 (Mo, 1935).)

b. That such hypersensitivity, and not the product, was the proximate cause of the injury (*Hesse v. Travelers Ins. Co.,* 299 Pa. 125, 149 Atl. 96 (1930); *Washstrom Opt. Co. v. Miller, supra,* page 7; *Hamilton v. Harris,* 204 S. W. 450 (Tex. 1918)).

c. That "such cases are so rare" that the allergic person assumes the risk of his predisposition (*Antowill v. Friedman,* 197 App. Div. 230, 188 N. Y. S. 777 (1921)).

d. These reasons all amount to saying that the manufacturer is not liable to the unusually sensitive person either because he has no duty of care to such persons or because the manufacture or distribution of his product is not the proximate cause of the injury because the manufacturer cannot reasonably foresee such injury resulting from the use of his product.

* * * * * * * * *

The courts have firmly refused to hold that a product contains dangerous or deleterious substances if its alleged injurious effect upon the plaintiff was due to (plaintiff's own) idiosyncrasy (*Drake v. Herman,* 261 N. W. 414, 185 N. E. 685 (1933); *Flynn v. Bedel Co. of Mass., supra,* page 3), but have ruled that a preparation is not deleterious to human health in the ordinary acceptation of that term simply because one person in a multitude of those using it happens to meet with ill effects from taking it (*Willson v. Faxoni, Williams & Faxon,* 138 App. Div. 359, 122 N. Y. S. 778 (1910), cited in *Clearly v. Maris, supra* this page).

Some courts have gone so far as to require not merely that defendant had knowledge that some predictable per-

centage of the public would suffer harm from use of the product, but that defendant must have known that the very plaintiff was especially sensitive or possessed of an idiosyncrasy with respect to the product (*Mutual Life Ins. Co. v. Dodge; Arnold v. May Dept. Stores; Wheeler v. T. G. & Co.;* and *Hesse v. Travelers Ins. Co.,* all cited *supra*).

It has even been held that the fact of plaintiff's allergy precludes application of the doctrine of *res ipsa loquitur* (*Runyan v. Goodrum,* 147 Ark. 481, 228 S. W. 397 (1921) see also *Antowill v. Friedman, supra* page 3).

3. Evidence and Burden of Proof.

The final question concerns a two fold problem: (1) Whether the plaintiff has the burden to prove that he is a normal user and not allergic or the defendant has the burden to show that plaintiff is unusually susceptible and that his product is harmless to average users; (2) what evidence will be sufficient to show that defendant knew, or should have known, that his product was dangerous either to the normal user or to some users who may have been allergic?

a. *Zager v. F. W. Woolworth Co.,* 30 Cal. App. 2d 324, 86 P. 2d 389 (1939). This case illustrates the rule that in an action for breach of implied warranty of fitness, the allergy of the user is a defense to the action. Where the seller introduced evidence that other persons had used the freckle cream purchased by plaintiff without harm, and plaintiff introduced no evidence of injury to anyone but herself from use of the cream, the appellate court held that the evidence was sufficient to support the trial court's finding that plaintiff's dermatitis was due to her own allergic reaction to the cream. This, implicitly, seems to

indicate that burden is on plaintiff to prove that the product is dangerous or harmful to normal users.

b. *Graham v. Jordon Marsh Co.,* 319 Mass. 690, 67 N. E. 2d 404 (1946). In action for breach of implied warranty, where plaintiff suffered a dermatitis following use of a cold cream purchased from defendant, the court held (67 N. E. 2d at 405):

> (3) "The burden, however, was upon the plaintiff to prove that the cream was unfit for use by a normal person. She could not prevail by showing that it was merely unfit for use by one who was constitutionally unable to use cold cream because of a supersensitive skin."

c. *Longo v. Touraine Stores, Inc.,* 319 Mass. 727, 66 N. E. 2d 792 (1946). In an action by buyer against seller to recover for dermatitis allegedly caused by wearing of gloves bought from seller, buyer had burden of proving that gloves were unfit to be worn by normal persons, and could not recover by merely showing that they were unfit for her or for some one unusually susceptible. The buyer's evidence was insufficient to sustain burden of proving that gloves were unfit to be worn by a normal person, where there was no showing of any intrinsically unhealthy quality in the gloves that would affect a normal person, but only evidence that buyer was allergic to the gloves.

d. *Karr v. Inecto, Inc.,* 247 N. Y. 360, 160 N. E. 398 (1928). Here a hairdresser at a beauty shop sued the manufacturer of a hair dye for injuries resulting when the dye which she was applying to a customer's scalp came into contact with her fingers. In denying recovery the Court of Appeal of New York laid down the following burden of proof to be sustained by plaintiff, at 160 N. E. 399:

"(1-2) Before the plaintiff may recover she must show, first that the injury to the finger resulted from contact with the chemical product manufactured by the defendant; second, that the chemical product was inherently dangerous and poisonous; and, third, that the defendant was negligent in putting upon the market a dangerous and poisonous product. If the evidence established that the liquid contained in the bottles of dye used by the plaintiff was dangerous and poisonous, then from the fact that the injury followed contact with the dye we might draw the inference that the injury was the result of that contact. In such case, too, we might, without further evidence as to how these particular bottles happened to contain a dangerous and poisonous liquid, infer that such a condition could not have arisen without fault on the part of employees of the defendant. As the foundation of her cause of action, the plaintiff must show by direct or circumstantial evidence at least that the bottles of dye manufactured by the defendant and used by the plaintiff contained a dangerous and poisonous liquid."

* * * * * * * *

"We assume that the injury was due to a chemical irritant or poison. . . . The dye had been applied to the hair and scalp of the customer. It had trickled down her forehead. Apparently it had not injured her, yet without other evidence that the dye contained a chemical poison or irritant we are asked to assume that this so-called 'chemical product' admittedly harmless to the customer, was dangerous and poisonous and caused injury to the plaintiff. Possibly some individuals may possess a peculiar

immunity against the effects of a particular chemical poison or irritant; possibly some other individuals possess a peculiar susceptibility. We know only that, even if the dye used may possibly be a competent producing cause of a morbid condition such as developed on plaintiff's finger, it does not always produce such a result, otherwise the customer would not have escaped injury. All else rests purely on conjecture."

e. *Ross v. Poreous, Mitchell & Braun Co.,* 136 Me. 118, 3 A. 2d 650 (1939). In an action for breach of implied warranty where plaintiff suffered dermatitis of the armpits allegedly caused by dress shields sold to her by defendant, the court held (at p. 653) "that in the sale of wearing apparel, if the article could be worn by any normal person without harm and injury is suffered by the purchaser only because of a supersensitive skin, there is no breach of the implied warranty. . . .

"In the case at bar, the cause of the plaintiff's skin affliction on the evidence remains a matter of doubt and conjecture. It may be that she was allergic to the dress shield or one or more of its component parts. . . . It is, of course, possible that the shields contained harmful and deleterious chemicals or substances, but they were not analyzed, and, if such be the fact, it has not been here established. We cannot resort to a choice of possibilities. That is guesswork and not decision. . . .

"The plaintiff, having failed to sustain the burden of proof . . . must be denied a recovery."

4. Application of doctrine of *res ipsa loquitur.*

a. It is fundamental to an application of the doctrine that if the accident can happen without negligence of the plaintiff the doctrine will not be applied.

b. Thus the doctrine is not applicable where the cause of the injury is, despite the circumstances of the injury, still left in the realm of conjecture or speculation. (*Tedrow v. Des Moines Housing Corp.,* 87 N. W. 2d 463 (Iowa, 1958); *Rollins v. Avery,* 296 S. W. 2d 214 (Ky. App. 1956). Cases such as *Bish v. Employer's Liability Assurance Corp.,* 236 F. 2d 62 (5th Cir. 1956) do not apply to the present case since in those cases the cause was established as the instrument and the only question was negligent manufacturing. Here the very cause of the injury is in doubt, and P's doctors so admit. The best they can do is "give an opinion" that the solution was the cause.

c. In such cases the application of the doctrine is a question of law and the submission of the case to a jury on that theory is error. (*Larkin v. State Farm Mutual Automobile Ins. Co.,* 233 La. 544, 97 So. 2d 389 (1957); *Gephardt v. Rike-Kumler Co.,* 145 N. E. 2d 197 (Ohio App. 1956); *York v. No. Central Gas Co.,* 69 Wyo. 98, 237 P. 2d 845 (1951).)

d. In California the doctrine has been held not to apply where the plaintiff has a hand in mixing the solution. (*Simmons v. Rhodes & Jamieson, Ltd.,* 46 Cal. 2d 190, 293 P. 2d 26 (1956); *Phillips v. Noble,* 152 A. C. A. 76, 313 P. 2d 22 (1957).)

e. In California, the doctrine creates only an inference which may be entirely overcome by evidence which is clear, positive, uncontradicted and of such a nature that it cannot be rationally disbelieved (*Leonard v. Watsonville Community Hospital,* 47 Cal. 2d 509, 305 P. 2d 515 (1956)). Here, Lewis presented the chemists' report that the solution was properly compounded; no contradictory evidence was introduced by P, and since this report was made as a normal business record and the basis and

manner of the tests described it would appear that it is evidence of a type which cannot be disbelieved.

f. Further P must show that the instrumentality which caused the injury remained in the control of D since the doctrine does not apply if the injury may have several causes.

1. Thus P must show that the instrumentality which caused damage was not mishandled or its condition otherwise changed after control was relinquished by the person against whom the doctrine is to be applied. (*Burr v. Sherwin-Williams Co.*, 42 Cal. 2d 682, 268 P. 2d 1041 (1954)).

2. The failure of the Court to so qualify the instruction regarding *res ipsa loquitur* is reversible error. (*Burr v. Sherwin-Williams Co., supra; Zentz v. Coca-Cola Bottling Co.*, 92 Cal. App. 2d 130, 206 P. 2d 652 (1949)).